

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

CREATIVE ENERGY SOLUTIONS, LLC

Employer

And

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 953¹

Petitioner

Case 18-RC-17075

DECISION AND DIRECTION OF ELECTION

Petitioner seeks an election in a unit of the Employer's propane service technicians and HVAC service technicians. The parties agree on the unit description as set forth below. The sole issue is whether Steve Koenig is a supervisor within the meaning of Section 2(11) of the National Labor Relations Act. Contrary to the Petitioner, the Employer contends that Koenig is a supervisor and should be excluded. After reviewing the record, I conclude that Koenig is an employee and not a supervisor within the meaning of the Act.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²

¹ The Petitioner's name appears as amended at the hearing.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. In order to understand my conclusions regarding the status of Steve Koenig, I will first summarize Board law regarding burden of proof and evidentiary standards in cases where supervisory status is in dispute. I will then summarize the record regarding the Employer's operation and Koenig's job. I will then discuss specifically the Employer's evidence regarding Koenig's alleged supervisory functions. Finally, I will explain my conclusion that the Employer has failed to meet its burden of establishing the supervisory status of Steve Koenig.

Overview of Board Law

The burden of establishing supervisory status is on the party asserting that such status exists. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001). Conclusionary statements, without supporting evidence, are insufficient to establish supervisory status.

Quadnax Environmental Co., 308 NLRB 101 (1992); Sears Roebuck & Co., 304 NLRB 193 (1991). Whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will conclude that supervisory status has not been established. Phelps Medical Center, 295 NLRB 486, 490-491 (1989).

² The Employer, Creative Energy Solutions, LLC, is a Wisconsin corporation with an office in Arcadia, Wisconsin, where it is engaged in providing propane and HVAC services to customers. During the past calendar year, a representative period, the Employer received gross revenues in excess of \$500,000 and purchased and received goods, materials and services valued in excess of \$50,000 directly from suppliers located outside the State of Wisconsin.

The Employer's Operation and Koenig's Job

The Employer began operation on September 1, 2001. It consists of two divisions. The propane division delivers propane fuel to customers. The heating, air conditioning and ventilation (HVAC) division repairs and installs furnaces and air conditioners. Michael Gleason is the Employer's sales and service manager, and responsible for the day to day operation of the business. Gleason is the only person who testified in the hearing on this matter. Excluding Gleason, the Employer employs one part-time receptionist and three full-time employees, who are Steve Koenig, Kory Kowahl, and William Forsythe. Forsythe is the only employee in the propane division, reports to Gleason, and is stipulated to be in the unit by the parties. Kowahl and Koenig are the only two employees in the HVAC division. The Employer contends that Koenig supervises Kowahl, and that Gleason supervises Koenig.

Koenig is hourly paid, fills out a time card, and receives overtime pay for hours worked in excess of 40/week. Kowahl and Forsythe are also hourly paid, fill out time cards, and receive overtime. Only Gleason is salaried. All personnel (including Gleason) have the same fringe benefits. Koenig is paid \$14.25/hour; Kowahl is paid \$11.25/hour; and Forsythe is paid \$14.50/hour.

In evidence is a job description for the HVAC Manager, which the Employer contends is Koenig's title. The Employer acknowledges that Koenig has never been shown the job description. The job description lists the following responsibilities: (1) Daily on and off site supervision of all department employees including scheduling employees for jobs and performing repair and installation jobs personally; (2) Hiring, firing and laying off of HVAC employees; (3) Determining wage rates of HVAC employees; (4) Bidding installation work; (5) Pricing product and hourly labor rates; (6) Billing out department invoices; and (7) Handling

customer complaints. Also in evidence is the advertisement for the HVAC job held by Koenig, placed in the newspaper on September 12, 2001. According to Gleason, the ad “accurately reflect(s) the role that Mr. Koenig has played in the company since September 12, 2001.” The ad states that duties include scheduling employees for daily service calls and installations, installation bids, pricing, invoicing and customer inquiries. No mention is made in the ad, however, with regard to hiring, firing, laying off, or determining wage rates of HVAC employees.

There is no dispute that Gleason relies upon Koenig for a number of responsibilities in the HVAC division. Koenig decides what work to accept or decline; he bids jobs, including determining the price to charge for parts and labor; he determines the order jobs are to be completed; he responds to all customer calls for assistance or complaints about work performed; he meets with suppliers; and he completes customer invoices. According to Gleason, there are many days when Koenig does not perform any service work. More specific testimony by Gleason suggests that Koenig might spend up to 15-20 hours/month completing paperwork and billing out invoices at the end of each month; that, except for Mondays, Koenig is in the office each day from 8:00-8:30 a.m. to make appointments with customers or schedule jobs; and that on Mondays he is in the office from 8:00-9:30 a.m. to handle customer calls with regard to problems that occurred over the weekends, and to meet with suppliers.

Koenig’s Alleged Supervisory Functions

Hiring, Firing, Laying Off Employees

Gleason testified that Koenig can hire, fire and lay off employees. Moreover, Gleason testified that Koenig hired and then decided to lay off former employee Luke Buehler, and to not recall him because Buehler’s work was unsatisfactory.

Gleason's testimony with regard to Luke Buehler's hire is that Mr. Buehler came to Gleason looking for a job; that Gleason sent Buehler to Koenig; that the two of them talked; and that Koenig said he wanted to hire Buehler. Gleason did not explain the context of this hiring – that is whether Buehler was responding to an Employer advertisement for employees or whether anyone else applied at the same time. Gleason also testified, later in the hearing, that Koenig hired Buehler based on the recommendations of employees Kowahl and Forsythe.

More generally, according to Gleason, Gleason would place ads for employees in the newspaper, would review responses and eliminate any that do not appear qualified, and then Koenig would interview the applicants and select the one he wishes to hire. Gleason concedes, however, this has never been done because except for Buehler, no one else has been hired.

With regard to the lay off of Mr. Buehler, Gleason testified that work was slowing down. He further testified that Koenig had told him on several occasions that Buehler's work was unsatisfactory. Therefore, when the work slowed down, Koenig decided to lay off Buehler. This lay off occurred in late January or early February, 2002. Then, according to Gleason, Koenig and Gleason discussed recalling Buehler in September, 2002. According to Gleason, "Koenig decided he simply couldn't work with him. He would rather take on additional work between himself and Kory Kowahl rather than bring back Mr. Buehler." Gleason did not explain why placing an ad and hiring a new employee was not an option at this time.

The employee handbook states that the general manager is responsible for hiring the employees of the company. In explaining this provision, Gleason testified that he "would ultimately hire and fire any employees," but that he would do so on the recommendation of the department supervisor such as Koenig. He then testified that he could choose not to fire or lay off an employee (in spite of a recommendation to do so) but that, in the case of Buehler, Koenig

was not going to have Buehler in the HVAC area. Finally, at another point in the hearing, Gleason stated that as the Employer is a small company, Koenig would “discuss” discipline and/or discharge with him (Gleason) beforehand. At yet another point in the hearing, Gleason testified that while Koenig could fire an employee on the spot if the employee stole or engaged in a physical attack, otherwise Koenig “would work with me.”

Assignment and Direction of Work

Gleason also testified that Koenig decides who will work on which jobs, and that Koenig’s options are to assign the work to himself, or to just Kowahl, or for the two of them to work together. However, later in his testimony, Gleason stated that generally Koenig and Kowahl use the same truck when working – that is they ride together. He said the only other truck is very old and they use it only when absolutely necessary. According to Gleason, “Generally Steve will drive Kory to a job, drop him, and then Steve will go to another job that he needs to go to if there’s two jobs.” Gleason offered no testimony on how frequently there are two jobs being serviced separately by Kowahl and Koenig. At another point, Gleason testified that for “many jobs” Koenig and Kowahl work together.

Time Off, Overtime, Verifying Timecards

According to Gleason, Koenig grants or denies time off to Kowahl. Moreover, because Kowahl also farms, he often needs time off, particularly in the spring to plant and the fall to harvest. Apparently this is largely limited to Kowahl leaving jobs early. Gleason testified that Koenig grants Kowahl’s requests if Koenig believes that he can complete the job the two are working on his own, and denies Kowahl’s request if Koenig believes that he cannot finish the work himself.

Gleason further testified that Koenig decides whether Koenig or Kowahl will work overtime. There is no testimony with regard to how often Kowahl works overtime. With regard to Koenig, he worked no overtime in the spring or early summer. During the summer, Koenig worked 2-6 hours of overtime, and in the fall he worked 10-12 hours of overtime each week. A majority of the overtime is the result of Koenig being on call – customers call in because, for example, their furnaces are not working. There is no record testimony suggesting what (if any) of Koenig’s overtime hours are attributable to times when he is not on call.

Finally, at one point in the record, Mr. Gleason testified that Koenig is responsible for approving Kowahl’s time card. However, later in the hearing Gleason explained that he doesn’t know whether Koenig actually “approves” Kowahl’s time card. Rather, Koenig and Kowahl work many jobs together, and what they do, is make sure their time cards are consistent with one another. For example, they would be careful to write down the same time for when a job ends.

Other Indicia

There is no evidence Koenig has disciplined an employee. While the job description for Koenig states that Koenig determines the wage rates of HVAC employees, in fact, according to Gleason wage rates are set by the Board of Directors. At one point Gleason testified that Koenig would recommend wages to him, and he in turn would go to the Board. At another point, Gleason testified that Koenig and he come up with a wage rate together, and then the Board of Directors gets involved. In any event, Gleason was clear that Koenig cannot determine employees’ wages on his own. To date no appraisals and no wage increases have been given to employees.

Conclusion

The Employer has not met its burden of proof because its evidence is conclusionary and inconsistent.

First, and most obviously, the job description differs significantly from the ad placed in the paper, and yet Gleason testified that the duties described in the ad represented Koenig's duties. In addition, of course, Koenig has never seen his job description. In any event, the content of a job description setting forth supervisory authority is not determinative of supervisory status. Bakersfield Californian, 316 NLRB 1211 (1995). Moreover, the reason job descriptions alone do not establish supervisory authority is evident in this matter. While the job description states that Koenig determines wage rates for HVAC employees, Gleason was clear that only the Board of Directors can set wages.

Second, and also problematical were generalizations by Gleason that Koenig assigns work, schedules overtime and authorizes time cards. More specific testimony revealed that Gleason does not know whether Koenig authorizes time cards; that (at least as far as this record reflects) any overtime is worked by Koenig and is attributable to his role as the Employer's on-call employee; and that for many jobs Koenig and Kowahl work side by side. Therefore, Koenig is not assigning Kowahl to work on different projects or sites from where Koenig is working. Moreover, there is no record evidence regarding the roles Koenig and Kowahl play while working together.

Finally, Gleason's testimony regarding Koenig's authority to hire, fire and lay off employees is imprecise and lacks consistency. At times Gleason stated that Koenig could hire, fire and lay off HVAC employees (seemingly at will). At other times Gleason qualified Koenig's authority. That is, Gleason testified at various points that he ultimately hired and fired

employees; that he could choose not to follow Koenig's recommendations; that Koenig and he would "discuss" discipline/discharges beforehand; and/or that other than physical violence or theft by an employee, Koenig "would work with me" before discharging an employee. At no point did Gleason further explain how this process would work. Even with regard to employee Luke Buehler, neither his hiring nor lay off are entirely clear. It appears that Buehler went to Gleason looking for work (and did not, therefore, respond to an ad); that Gleason sent Buehler to Koenig; and that Koenig told Gleason that he wanted to hire Buehler based on recommendations from employees Kowahl and Forsythe. Similarly, when Buehler was laid off, it appears what prompted the lay off was a decline in workload. When work picked up, apparently Gleason initiated a discussion about calling Buehler back. The fact that Gleason initiated such a discussion suggests either that Buehler's prior work performance was not as unsatisfactory as Gleason claimed or that Gleason viewed Koenig's recommendation to lay off as worth a second look. I would emphasize that Buehler's lay off and possible recall appear to have the subject of discussion between Gleason and Koenig, and that it was not Koenig's decision alone, as suggested by Gleason during points in his testimony.

In Demco New York Corp., 337 NLRB No. 135 (2002), ALJ Jesse Kleiman analyzed a foreman's authority to effectively recommend whether an employee is retained or discharged.³ In finding the foreman a supervisor, Judge Kleiman found that the evidence established that a general manager relied on the foreman's recommendations, having never observed the work performance and never having visited some jobsites where employees worked. 337 NLRB No. 135, slip. op. at p. 7. In this matter it is clear there were discussions between Gleason and Koenig prior to Buehler's lay off and when the decision was made not to recall him. What I

³ The Board noted that no exceptions were filed to this aspect of the ALJ decision, 337 NLRB No. 135, slip op., p. 1 ft. 2.

cannot conclude, based on this record, is that Koenig made a recommendation that lead to a personnel action, without independent investigating, review by Gleason, or discussion with Gleason. See Custom Mattress Mfg., 327 NLRB 111 (1998) (where witness testified that she recommended raises be given, and they were given, supervisory status not found because circumstances under which she made recommendations and the actual role her recommendations played, not developed), Cherokee Heating Co., 278 NLRB 399, 405 (1986) (hiring employee at suggestion of supervisor does not establish supervisory status); The Door, 297 NLRB 601 (1990) (equivocal testimony does not demonstrate the authority to effectively recommend the hire of employees.); George C. Floss Co., 270 NLRB 232, 234 (1984) (ultimate effects of recommendations are not clear from record), *enfd.* George C. Floss Co. v. NLRB, 752 F.2d 1407, 118 LRRM 2746 (9th Cir., 1985) (effective recommendations” to supervisors about lay offs and promotions were informal discussions and suggestions). Moreover, the ability to send an employee home for flagrant misconduct, such as physical assault or theft, is not indicative of supervisory status. Venco Hospital Los Angeles, 328 NLRB 1136, 1139 (1999). Finally, the fact that Koenig can allow Kowahl to leave early does not suggest supervisory status where Koenig’s judgment is based solely on whether Koenig can finish a job himself, or needs Kowahl in order to timely finish. Millard Refrigerated Services, 326 NLRB 1437, 1438 (1998) (decision to send employees home based solely on observation that there is no work to be done, does not involve the use of independent judgment).

In reaching this conclusion, I recognize that Gleason testified without contradiction that he relies on Koenig’s expertise in the HVAC area. As a result, Koenig schedules appointments with customer, orders supplies, determines bids for jobs, and deals with customer complaints. However, none of these duties establishes that Mr. Koenig is a supervisor within the meaning of

Section 2(11) of the Act. Electrical Specialties, Inc., 323 NLRB 705 (1997) (authority to order materials and sign purchase orders not supervisory); George C. Foss Co., supra, at 234 (skilled electricians responsibility for running job not itself evidence of supervisory status).

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and part-time propane service technicians and HVAC service technicians, including the HVAC manager; excluding office clerical employees, guards and supervisors as defined in the National Labor Relations Act, and all other employees.

DIRECTION OF ELECTION⁴

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which

⁴ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 – 14th Street N.W., Washington, DC 20570. This request must be received by the Board in Washington by **January 2, 2003**.

commenced more than 12 months before the election date and who have been permanently replaced.⁵

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by International Brotherhood of Electrical Workers, Local 953.

Signed at Minneapolis, Minnesota, this 18th day of December, 2002.

Ronald M. Sharp, Regional Director
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⁵ To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Minneapolis Regional Office, Suite 790, 330 Second Avenue South, Minneapolis, MN 55401-2221, on or before close of business **December 26, 2002**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.